No. 2679

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

F. R. BRENNEMAN, U. S. Marshal,
and
JAMES M. MILLSAP, Deputy U. S. Marshal,
Plaintiffs in Error.

vs.

H. M. FAGERBERG,
Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT COURT,
FOR THE TERRITORY OF ALASKA,
THIRD DIVISION.

BRIEF OF PLAINTIFFS IN ERROR

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STATEMENT OF THE CASE.

In this brief defendant in error will be referred to as plaintiff, and plaintiffs in error as defendants, as in the court below.

This action was instituted to recover damages for an alleged wrongful attachment levied by the United States marshal through one of his deputies, his co-defendant herein, upon certain property which was claimed to be the property of one J. A. Fagerberg, a brother of plaintiff and defendant in error herein.

After the levy was made demand was made by

plaintiff H. M. Fagerberg upon the deputy marshal for return to him of part of the property levied upon and which is the subject matter of this action. The marshal refused the demand and held the property. Thereafter this action was brought by H. M. Fagerberg as stated. The case was tried before a jury and a verdict was returned in favor of the plaintiff, upon which judgment was rendered by the trial court, and defendants sued out this writ of error.

The facts in regard to the disputed property as claimed by defendants, and not contested except as to the issue of partnership, are as follows:

In the summer of 1907, Thomas Carstens of Seattle, president and principal owner of the Carstens Packing Company, was the owner or chief owner of a stock of merchandise situated in the Chititu mining district of Alaska, about 200 miles from the southern coast. The business had not been managed in a satisfactory way and the man who had been in charge was leaving Alaska. Carstens made a proposition to J. A. Fagerberg, with whom he had had some dealings, to take charge of the store. Fagerberg agreed to do so, but stated that he could not put in all his time at it and proposed to employ his brother, H. M. Fagerberg, plaintiff herein, to run the store. This was agreed to and it was agreed that H. M. Fagerberg should receive a salary of $1,500 per year for his services. H. M. Fagerberg remained in charge of the store until the fall of 1910, when he gave it up. Thereafter the store was at times closed and at other times different persons had charge of it.

H. M. Fagerberg testified that during the three years he managed the store he received none of his compensation except very small amounts from time to time for necessary personal expenses and that when he left the store more than $4,000 was due him. At that time, according to his testimony, he had in his possession $3.800, which he proposed to apply on his account. Both he and J. A. Fagerberg testified that J. A. Fagerberg persuaded him instead to loan the money to the latter, who was about to build a roadhouse at Blackburn, Alaska, not far from Chititu, which roadhouse thereafter became a part of the subject matter of this action. Both brothers testified that H. M. Fagerberg did loan $3,800 to J. A. Fagerberg, without any writing to evidence the same, without any agreement for interest, or any time fixed for payment, and that the amount had never been paid nor any part of it. They further testified that H. M. Fagerberg continued to work at $125 per month without any interest in the business, and later for $100 per month.

H. M. Fagerberg testified that he then believed he was still working for Thomas Carstens and J. A. Fagerberg; that he never received any information to the contrary. He testified that he worked all through the fall and winter of 1910 and 1911 in building the roadhouse and had charge of the work, and that he conducted the roadhouse part of the time after it was built, doing all this under his agreement of 1907 to work for Thomas Carstens and J. A. Fagerberg for $125 per month. Both he and J. A. Fagerberg explic-

itly denied that any partnership existed between them at any time between the year 1907 and the trial of the action. They both testified that H. M. Fagerberg had no interest in any business of J. A. Fagerberg except the wages it was agreed he was to receive and that he never in the seven years from 1907 to 1914 drew any of his wages except small amounts for necessary personal expenses. Both Fagerbergs testified that in the spring of 1912 H. M. Fagerberg agreed to accept a reduction of his wages from $125 to $100 per month and that he thereafter worked for the latter amount.

In 1912 the wife of J. A. Fagerberg sued him in the district court of Alaska for separate maintenance and obtained a decree ordering him to pay her $50 per month. In the summer of 1913, J. A. Fagerberg, then in Seattle, was threatened with legal process of various sorts, including arrest, to compel him to pay the amount due his wife for separate maintenance. In July, 1913, he made a bill of sale of everything he owned in Alaska, including the Chititu store, transferring and conveying everything to H. M. Fagerberg. Testimony was conflicting as to the reasons for this transfer. The Fagerbergs testified that it was made to secure H. M. Fagerberg for about $5,000 due him for wages. Officers of the Carstens Packing Company testified that it was done to cover up all property in J. A. Fagerberg's name and put it beyond the reach of his wife's demand for separate maintenance.

During all the time from 1910 to 1914, the Fager-

bergs were closely associated in business, and it was admitted by them that they were commonly reputed to be partners in the district where they were operating. It was admitted that each of them seemed to be interested in all the business which the other transacted and in all property which the other controlled. They worked together or alternately in conducting the roadhouse, in logging contracts, in freighting and in carrying mail under a government contract.

In the early part of 1914, J. A. Fagerberg was in Seattle and engaged in some negotiations with Thomas Carstens to obtain money and goods for a mercantile venture in the Shushanna mining district of Alaska, a newly discovered camp which in public opinion had a great future. The testimony was conflicting as to who was most interested in these negotiations. Fagerberg testified that Thomas Carstens and others associated with him were very anxious to give him an outfit for the Shushanna to recoup at least a part of the heavy loss in the Chititu store. Carstens and other officers of the Carstens Packing Company testified that Fagerberg tried hard to obtain from Carstens a large amount of money and goods, but Carstens turned him down. Fagerberg, however, bought a large shipment of oats on Puget Sound and had them shipped to Alaska C. O. D. He then drew a sight draft on Thomas Carstens for the freight, which was paid. Carstens testified that he had no prior agreement to pay it and that on the contrary he had expressly told Fagerberg he would not furnish him any more money but would, if he wished it, supply

him with a small amount of meat; that when the sight draft arrived, after reflection, he decided to pay it because he had always had a liking for Fagerberg and it occurred to him, as he put it, that Fagerberg had a chance to get on his feet and that he would take one more chance with him and help him. After that he sent a large stock of merchandise of the value of more than $4,000 to Fagerberg upon agreement by correspondence that Fagerberg was to remit to him the proceeds as fast as the goods were sold. This Fagerberg failed to do. Carstens sent an agent to Alaska who reported that Fagerberg was converting everything to his own use and Carstens thereupon instituted an action to recover the amount of the goods and sight draft from Fagerberg, and attached everything he had, including the property claimed by H. M. Fagerberg.

When J. A. Fagerberg returned to Alaska about March 1, 1914, he told H. M. Fagerberg that a corporation was to be organized composed of themselves and Thomas Carstens, which was to take over all the property then standing in H. M. Fagerberg's name. At the same time he made a memorandum agreement with H. M. Fagerberg by which the latter was to transfer everything to this corporation and go into its employ as a packer at $100 per month, and until the corporation was formed he was to work for J. A. Fagerberg and Carstens at that salary; meanwhile leasing to them at figures aggregating $825 per month the property which he proposed to sell. Thereafter he worked as a packer until the attachment was levied

early in the following August. According to the testimony of the Fagerbergs, after the levy J. A. Fagerberg turned everything over to H. M. Fagerberg and said he would quit. This was considered by them a delivery of all the property in use by either of them to J. A. Fagerberg.

It was admitted that no profit was made between March and August by any enterprise in which the Fagerbergs were engaged—roadhouse, stores and freighting business were paying out more money than they took in. It was claimed, however, that the paying business would have been later. J. A. Fagerberg testified "August and September are big months." It was in evidence that in September J. A. Fagerberg was put into bankruptcy on petition of his brother, H. M. Fagerberg, and that the schedules in bankruptcy showed wages due several employes for several months back, besides large sums for merchandise.

ASSIGNMENTS OF ERROR.

I.

The court erred in admitting in evidence, over the objection of defendants, plaintiff's exhibit "D," which purported to be a contract between Thomas Carstens and J. A. Fagerberg on the one part and H. M. Fagerberg on the other part; it being conceded by plaintiff and by his witness, J. A. Fagerberg, that said contract was signed only by J. A. Fagerberg, and H. M. Fagerberg, the name of Thomas Carstens being appended thereto by J. A. Fagerberg without his knowledge; the same purporting to be a contract

for a partnership among said parties and ultimate incorporation.

II.

The court erred in admitting the testimony of the plaintiff, H. M. Fagerberg, over the objection of defendants, as to speculative profits he might have made in conducting the Blackburn roadhouse and using the attached horses if the attachment had not been made.

The court erred in admitting testimony of profits lost by reason of the attachment of the roadhouse and horses after evidence had been offered by plaintiff himself designed to show that both the roadhouse and the horses had been leased for about five months prior to the first levy under the writ of attachment complained of and that during all of said time, he had been working for $100 per month for J. A. Fagerberg under a contract for an indefinite period that was terminated by levy of the attachment.

III.

The court erred in refusing to give part of instruction No. 5 asked by defendants as follows:

> "You are instructed that possession of property is presumptive evidence of ownership, until the basis of ownership is otherwise explained, and long continuance in possession strengthens the presumption of ownership.
>
> In this case if you find that the Blackburn roadhouse and equipment had been in possession of J. A. Fagerberg most of the time since it was constructed, and that H. M. Fagerberg never had charge of it for a considerable length of time,

you are entitled to consider the facts regarding possession as making a *prima facie* case of ownership in J. A. Fagerberg."

IV.

The court erred in denying defendants' motion for a new trial.

V.

The court erred in ordering the judgment entered in this cause in favor of plaintiff and against defendants.

ARGUMENT.

In argument all the assignments of error may be considered together, because it is the verdict that defendants complain of, on the ground that it was wholly unjustified by the evidence and appeared to have been given under the influence of passion or prejudice. This objection to the verdict is set up in the motion for a new trial, denial of which is assigned as error (Assignment IV).

As already shown in the statement of the case the vital issue in the trial was the question whether or not a partnership existed between the two Fagerbergs. All other issues revolve around this. If the Fagerbergs were partners, they were joint owners of the property involved, jointly and severally liable for all firm indebtedness and either could be sued on account of such indebtedness, and any property belonging to either or to the firm could be taken on attachment or execution. Counsel for defendants are mind-

ful of the rule that appellate courts are reluctant to reverse a trial court on a question of fact. Nevertheless they will do so when the judgment is so clearly against the weight of evidence that to allow it to stand would be palpable injustice. The rule is thus stated in *Darlington vs. Turner*, 202 U. S. 195-220:

> "Where both courts below have found a particular state of facts we do not disregard them except upon the conviction that the lower courts clearly erred in their conception of the weight of the evidence."

In that case the supreme court reversed the court of appeals of the district court of Columbia, which had affirmed the supreme court of the district in upholding the findings of an auditor to whom the case had been referred.

Defendants contend in the case at bar that not only did the preponderance of evidence point irresistibly to the conclusion that the two Fagerbergs had been in partnership for several years and were joint owners of the property, but their own admissions and their names appended to numerous documents signed "Fagerberg Brothers" raised a quasi estoppel against them to deny that they were partners. Further, their contradictory testimony and weird explanations should have raised an almost conclusive presumption against their veracity. Some of their assertions of fact would stagger not only credulity but gullibility. On many matters they were flatly contradicted, leaving no escape from the conclusion that either they or the contradicting witnesses were guilty of wilful perjury. These contradictions will be given

hereafter in this brief in order that this court may decide which witnesses committed perjury.

H. M. Fagerberg, the plaintiff, testified that he took charge of the Nizina store August 1, 1907, at a salary of $1,500 a year (R. 18-20-63); that he left the store late in the fall of 1910 (R. 66); that at that time he had been paid only about $500 or $600 of his salary (R. 20); that about $4,500 was due him (R.70): that he then had in his possession $3,800; that he intended to keep that and quit his job, but J. A. Fagerberg talked him into leaving the money in the latter's hands to be used in business, and to continue working at a wage of $125 a month at anything J. A. Fagerberg wanted him to do. The following from the record, page 24, is illuminating:

> "A. I asked him—I had the money; I had practically $3,800 in my possession then, and I told him I wanted my money. 'Well,' he says, 'after I put you in here and give you a chance to make this money, you are going to pull it out and give me and Carstens no chance at all, when there is a chance to make some money.'
>
> Q. And the upshot of it was, you turned the money over to him and didn't hold it out?
>
> A. I didn't hold the money out of him.—I stayed with him."

The plaintiff also testified on cross-examination that he considered that he was working for J. A. Fagerberg and Thomas Carstens for wages all the time from 1907 until his brother gave him a bill of sale for all the property held by either Fagerberg in July, 1913; that in all that time he never drew any money except for expenses; that he never saw Thomas Cars-

tens nor had any communication with him although he once visited Seattle. The following luminous statements from pages 70-1-2-3-4 of the record illustrate the free tenor of plaintiff's conversation on the witness stand. It will be noted that he was uncertain whether it was $4,000 or $4,500 that was due him in the fall of 1910:

> "Q. At the time you quit the store, or practically quit it, in the fall of 1910, how much was due you for back salary—at the time you say you quit the roadhouse and went into the logging camp—how much was due you for back salary at $1,500 per year?
>
> A. Well, there was practically $4,500.
>
> Q. When you left that work at the Chititu store, when you quit spending all your time at the Chititu store, which was about August or September, 1910—how much was due then for wages or salary?
>
> A. Probably $4,000.
>
> Q. Then you had received practically nothing during those three years?
>
> A. No, practically nothing.
>
> Q. You had been working for your board, as far as receiving anything was concerned?
>
> A. That's the fact, yes.
>
> Q. You had about $4,000 coming?
>
> A. Yes, sir.
>
> Q. Now, you were working for Al when you worked in the logging-camp and built the roadhouse at Blackburn?
>
> A. Yes, sir.
>
> Q. You had no interest in that?
>
> A. No, sir.
>
> Q. And when you accepted a reduction in salary to $100 per month in the spring of 1912, you were still working for Al?
>
> A. Yes, sir.
>
> Q. When you were working at the Chititu

store from 1907 to 1910, your understanding was that you were working for J. A. Fagerberg and Thomas Carstens?

A. Practically, as I understood the conditions between Al and Thomas Carstens?

Q. And for whom were you working when you quit the Chititu store and went out to the logging camp—were you still working for Thomas Carstens?

A. Practically, under the same agreement in force.

Q. And during all of 1911 then, when you were working on the construction of the Blackburn roadhouse and in the fall of that year, including 1912 when you freighted on the trail, you considered that you were still working for Thomas Carstens?

A. I certainly did.

Q. You understood that there was a sort of general partnership between J. A. Fagerberg and Thomas Carstens in the business that J. A Fagerberg was doing in the Nizina country?

A. Something to that effect, yes, sir. The way I understood it, at the time the Carstens Packing Company held a bill against the old Nizina Trading Company and at the instigation of the Carstens Packing Company this was turned over to Al—that is my understanding of it; that was the way it was explained to me.

Q. And you were still working for J. A. Fagerberg and Thomas Carstens, or the Carstens Packing Company, as the case may be?

A. As the case may be, yes, sir; I don't know how the situation stood exactly; that is the way it was explained to me at the time.

Q. At what time? Until what time?

A. Until 1913.

Q. Until you got this bill of sale?

A. Yes, sir.

Q. The latter part of the summer of 1913?

A. Yes, sir.

Q. And your understanding was that you were working for Thomas Carstens in the freighting?

A. Yes, sir.

Q. And in the roadhouse?

A. Yes, sir.

Q. And in the construction of the roadhouse?

A. Yes, sir.

Q. Did you see Mr. Carstens when you were in Seattle in 1909.

A. I did not, no, sir.

Q. Did you hunt him up?

A. No, sir, I did not.

Q. Did you have any correspondence with Mr. Carstens or the Carstens Packing Company about your work up there?

A. I never did.

Q. At the time you quit working at the Chititu store and when getting out logs for the Blackburn roadhouse, your idea was that Mr. Carstens was to be interested in the Blackburn roadhouse?

A. The same principle would apply there; in fact I demanded my money in 1910, before I went over there, and as I explained before, I agreed to stay by the proposition with them—my wages were still in the business.

Q. At that time you had about $3,800 in your possession?

A. I had that, yes, sir.

Q. Which you could have held out under your contract?

A. Which I could have held out under my contract and stuck it into my pocket.

Q. And instead of that, in order to help along the business you staid right with it, and allowed Al Fagerberg to use it?

A. Yes, sir.

Q. And you never went to see Mr. Carstens or said anything to him about it?

A. I never did.

Q. You got uneasy about your money?

A. I got uneasy about my money, yes.

Q. Did it ever occur to you to write Mr. Carstens to ask him how far he was backing Al in the business he was doing?

A. It never occurred to me, never thought of it.

Q. At the request of Al, you left the $3,800, which was in your possession and which you could have retained, if it was due and owing to you, you left it at his request and went working for him and did work for him for nearly a year in the construction of the roadhouse and still had $4,000 due you—didn't you consider it worth while to ask Mr. Carstens, write him and ask him if he was interested in the roadhouse?

A. It didn't strike me that way, no, sir.

Q. You have stated there was $4,000 due you?

A. Al was handling that and they could talk that over themselves; I might have gone further with Al than I would with anyone else, naturally would.

Q. But you became quite dissatisfied, according to your own statement, in the spring of 1912—so much so that you and your brother had a serious disagreement?

A. Yes, sir.

Q. But you continued to work for Fagerberg and Carstens for more than a year after that without writing to Mr. Carstens and asking him whether he was back of it?

A. Why, no, of course I didn't; it never entered my mind. I understood the proposition and Al was handling that end of it for him. They never took the trouble to consider me; I was dealing with Al and he was representing them.

Q. When did you quit working for Al Fagerberg and Thomas Carstens?

A. When the deed was delivered over to me."

Plaintiff continued to work for wages, according to his statement, until July, 1913, drawing only enough money for expenses and at that time had $5,600 due him, as stated on cross-examination (R. 76), or $5,300, as he stated on direct examination (R. 32). The following from the latter page is cited to show plaintiff's careless manipulation of figures. He was testifying concerning the bill of sale, which stated $4,500 as its consideration;

> "Q. Did you have more money than that coming at that time from J. A. Fagerberg, July 15, 1913?
>
> A. Yes, I think I did.
>
> Q. How much more?
>
> A. It was practically about $500 more than that,—practically $800.
>
> Q. $800 more than is stipulated there—then that would be $5,300?
>
> A. $5,300 that I had coming."

On the matter of plaintiff giving back the $3,800 which was less than the amount due him for wages in 1910, to be used for the sole use and behoof of J. A. Fagerberg and Thomas Carstens, the court will please note the testimony of J. A. Fagerberg (R. 192-3-4-5), showing that no evidence in writing was given of the loan, it was to draw no interest, was unsecured, and had no fixed time of payment:

> "Q. Did you have any talk to him about this $3,800 that he had in his possession or under his control?
>
> A. Yes, in the fall of 1910.
>
> Q. Was that before he started in on the logging?
>
> A. He had already started; he had the logs practically out and he had the barn up.

Q. And who was paying the wages of the men at that time?

A. I paid them afterwards, after I came in.

Q. At that time they hadn't been paid?

A. At that time they hadn't been paid; he got the supplies from Blum to supply the men. their clothing.

Q. State your version of the conversation between yourself and Harry over this $3,800?

A. We got into an argument over it and what started it, somebody issued a check on the Valdez bank, issued a forged check on Harry, and Mr. Lang said to me, 'Harry has overdrawn his account,' and I said, 'I don't see any reason for it,' but I said, 'All right, charge it up to me, to my account,' and when I went in there—I had been working hard all summer, and had been out on the trail and around and I was cold and cranky, and I jumped on him rough-shod for overdrawing his account, and one thing led to another and I asked him what he had done with the money. 'Was it necessary to overdraw your account and I have to make it good for you,' and he said, 'I have $3,800 for my salary,' and an argument came up about the place at Kennecott; 'Well,' he says, 'I am holding that out for my salary, and I intend to hold it, too,' and the argument went on until we landed into a scrap; I was stronger; I didn't want to abuse the boy and I held him until he cooled down a bit and told him where he was at and talked him out of it.

Q. Where was the $3,800 at this time?

A. He had the money in the Scandinavian-American Bank, I think, outside.

Q. He turned that over to you?

A. Yes, he gave me a check for it on the Scandinavian-American Bank.

Q. So you are sure it was the Scandinavian-American?

A. Yes, sir.

Q. Did you concede at that time that the $3,800 was due him?

A. Yes, sir, I conceded that the $3,800 was due him, I concluded the $3,800 was due the boy and I think a little more.

Q. How did you persuade him to give it up to you?

A. I said to him, 'I put you in here and I am up against it on the proposition,' but I told him the advantages of the thing and the points of the argument, and I said, 'The property is worth it; any time I fall down you have the house here, when I put in the house—you can't lose any way, even if the Carstens Packing Company gives you the dirty end of it.'

Q. You literally talked him out of it?

A. I literally talked him out of it.

Q. By smooth talk?

A. You bet you, I admit that.

Q. What inducement did you offer him to give up that $3,800—anything but the desire to help you?

A. No, nothing else but the brotherly feeling there was in that respect. I never offered him any inducements; I told him the prospects of the country and the advantages of the country.

Q. He wasn't to be in on the rake-off?

A. No, sir.

Q. Absolutely had no interest in the Blackburn place?

A. No, he had no interest whatever.

Q. Not even an optional interest?

A. Not even an optional interest; no, he was simply on a salary and that was the cause of the fight, and the fight between myself and wife was over that old stock and I was standing up for the Carstens Packing Company.

Q. At that time, in the fall of 1910, he was working for you at $125 and he loaned you this $3,800 without interest simply to help you out?

A. That was my understanding with Harry when I put him in there. I thought $1,500 was good wages and he could let it stay in the business.

Q. Did you still owe him the money in 1912?

A. Yes, sir.

Q. And was that evidenced by a note or anything?

A. He had this contract that Mr. Brock drew up for him.

Q. He never had anything in writing until Mr. Brock drew that up in the spring of 1912?

A. No, sir.

Q. Was it a part of the consideration in the agreement that his wages were cut to $100 per month?

A. I don't know.

Q. He let you have this $3,800 indefinitely, without any interest or without anything in writing until the memorandum agreement was drawn up by Mr. Brock in the spring of 1912?

A. Yes, sir.

Q. And he continued under the old arrangement, except that his salary was cut to $100, until the summer of 1913?

A. Yes, sir."

The court will observe that plaintiff "wasn't to be in on the rake-off," and had no interest, "not even an optional interest" in anything but his wages, and such was his child-like fidelity and devotion that he continued to work on that visionary basis for three years more and still received no wages except enough for personal expenses. This interesting story seems to have placed no strain upon the credulity of the jury, though it appears to counsel for defendants that its vast improbability should record an instant and deep impression upon an average mentality. Returning to the extemporaneous remarks of plaintiff he gives the following account of proceedings after he handed back the $3,800 to his brother to be used with-

out security or increment in the speculative business of J. A. Fagerberg and Thomas Carstens, a business which seems to have germinated and fructified nothing but debt for all concerned. Hear him (R. 66-7):

"Q. In the fall of 1910, you went at something else?

A. Yes, sir.

Q. You went to logging, I believe, you said?

A. I did, yes, sir.

Q. That was for the purpose of getting out logs to build the Blackburn roadhouse, I understand?

A. Yes, sir; and another thing, we got out logs.

Q. Who do you mean by we?

A. My brother and myself; I naturally say we since I was connected with the business and working there, Sam Rogers and myself; that is the way I put it; he was the man working with me, cutting these saw logs. We cut practically 80,000 feet of saw logs and hauled them to the mine, hauled them in the winter and they were out on shares by the Kennecott Mines Company, and half of them, half the lumber—it was divided.

Q. Divided between whom?

A. The Kennecott Mines Company and my brother and myself.

Q. The purpose of that logging was to obtain lumber for the—

A. For the construction of the roadhouse.

Q. Did you go back at any time to run the Nizina store?

A. No, sir; not after the spring of 1911.

Q. You never were in active charge of the store for any length of time after you quit in the early fall of 1910?

A. No, sir; not while it was in operation.

Q. You stated that you worked around at different things during 1911—a good part of the

time you were working on building the Blackburn road house?

A. Yes, sir.

Q. And what time was that finished?

A. It was finished along in the fall; we started to build, the actual construction of the building, in the spring of 1911 and the barn and outbuildings, and it was finished in the fall, towards the fall."

The court will observe that the plaintiff's nimble tongue in this chapter tells what "we" did. Also that "we" got out lumber to build the roadhouse at Blackburn, which plaintiff says he had no interest in although half the lumber belonged to "my brother and myself." Plaintiff thought he was working for his brother and Carstens for wages for six years, of which he received very little, and yet when questioned about a newspaper advertisement reading "Fagerberg Brothers," which he said he did not put in the paper himself, he explained (R. 81):

> "The way that was, when I went into Chititu, the name of Carstens and Myers, they couldn't do business in there because their name was so damned rotten, and I was running the store there, between me and my brother—I was running it there and it naturally drifted into Fagerberg Brothers. We had a pretty fair reputation and were doing things on the square."

When his attention was directed to the fact that he had worked a long time for Carstens notwithstanding the latter's "rotten" name, he explained (R. 43-4):

> "Q. You say the Carstens Packing Company had a bad reputation in there?

A. They certainly did.

Q. Didn't you take a long risk to work for Thomas Carstens for six years, if he had a bad reputation, without writing to him and asking him when he was going to pay you?

A. Perhaps I did, but at the time I went in there, I didn't know the people I was dealing with as I do now.

Q. You say they had a bad reputation at that time?

A. I was taking other people's word for that, I hadn't found it out; I have to be shown first and when I am shown, I know it."

On page 96 of the record plaintiff admits:

"Q. You worked for Al Fagerberg and the Carstens Packing Company, Thomas Carstens, for nearly six years, until they owed you a balance of nearly five thousand dollars, and you never wrote to Thomas Carstens and asked him for the money?

A. No, sir; I never did."

This queer testimony, like numerous other fragments, demonstrates that plaintiff's memory and ideas are highly adjustable.

Documentary admissions of partnership were numerous. Plaintiff admitted that an advertisement of Fagerberg Brothers' store ran in a Valdez paper two or three years (R. 80). Also that he used billheads reading "Fagerberg Brothers," and signed numerous bills made out on them "Fagerberg Brothers," by himself, using either his full name or initials (R. 83-4). A stipulation as to the record (R. 437) lists ten of these bills and shows the form of billhead. Another is shown on page 369 of the record. On page 87 of the record appears a letter to Schwabacher Bros., Seattle, enclosing check for $109 on account,

signed "Fagerberg Bros., Pr. H. M. Fagerberg," which plaintiff admitted he signed. He gave this naive explanation (R. 88):

> "I sent it that way as I explained before, the business has been conducted as Fagerberg Brothers to protect the Carstens Packing Company, and used as a firm name in that respect only."

This stock explanation of plaintiff's yearning to hold the Carstens' name invisible flashes up at intervals in his testimony like a blinker light. It was his dernier resort when no other excuse for the partnership name seemed available.

Plaintiff received a check in July, 1912, drawn in favor of Fagerberg Bros. and indorsed it "Fagerberg Bros. Per H. M. Fagerberg, member of firm" (R. 89). He admitted that when the Blackburn roadhouse was taken back from Breedman & Church in 1914, a stock of goods was taken with it and paid for in notes signed by himself and J. A. Fagerberg (R. 92). He admitted that when Malcolm Brock of Blum & Co., effected a settlement between him and his brother in the spring of 1912 a mortgage was given to Blum & Co. for about $2,600 and signed by the two Fagerbergs. As usual plaintiff had an explanation. Here it is (R. 384):

> "Q. State the circumstances under which you signed that mortgage?
>
> A. Mr. Brock insisted on my signing it—he said my name had been used in the business and he held me as responsible as he would Al—he looked at it that way and I signed it."

Brock was manager of the bank and mercantile

house of S. Blum & Co., at Cordova, with which the Fagerbergs had done business for several years, and to an extent that led to an indebtedness of $2,600. He evidently knew the relations existing between the two Fagerbergs. It might be mentioned here that plaintiff made much in his testimony of this agreement between himself and brother, drawn by Mr. Brock as a settlement between the two Fagerbergs. He insisted that it showed that he was only working for wages, but this extremely valuable agreement, which called for the payment to him of $4,000 by his brother, was unhappily lost before the trial. Plaintiff said he had looked for it but could not find it (R. 26-166-7). The two Fagerbergs testified to its contents but Mr. Brock was not subpœnæd although he would have been a disinterested witness.

Plaintiff's Exhibit C (R. 34), the lease of the Blackburn roadhouse from J. A. Fagerberg to S. O. Breedman, dated November 16, 1912, describes "The Blackburn roadhouse heretofore operated as a roadhouse by Fagerberg Brothers" (R. 34). Defendants' Exhibit 5 (R. 223) was an order for goods dated April 7, 1915, which J. A. Fagerberg admitted was in his handwriting and that he sent it out (R. 222). It was signed Fagerberg Bros.

J. A. Fagerberg admitted that he authorized an advertisement of the Nizina store to be put in the Valdez *Prospector*, but said the newspaper man wrote the ad. He admitted also that he saw the ad from time to time (R. 224-5). He gave the same explanation of the billheads reading "Fagerberg

Brothers" (R. 225-6). He invited the court and jury to believe that a Seattle printer printed billheads under that firm name without an order to do so. Here is the statement:

> "A. In 1910 Harry said he had run out of the old Nizina billheads, and he said, 'Better send for some billheads,' and I had some billheads printed; and the way that came out Fagerberg Brothers, I met Johnson in Seattle and a man connected with the stationery company and told them to get me out several thousand billheads, blank form; I picked out the form and there was nothing said about the heading and they knew me from schooldays and knew Harry was with me and they just put it in Fagerberg Brothers.
>
> Q. You didn't tell him to put it in Fagerberg Brothers, General Merchandise, Nizina, Alaska?
>
> A. He asked me what I was doing up there and I said, 'This is for a general merchandise store, miners' supplies.' "

Concerning the Blackburn roadhouse J. A. Fagerberg conceded (R. 165):

> "Q. You got that house constructed in the fall of 1911?
>
> A. Yes, sir.
>
> Q. Did you open it up for the accommodation of guests?
>
> A. Yes, sir.
>
> Q. Did you run it yourself on the start?
>
> A. Not on the start I did not.
>
> Q. Who did run it?
>
> A. Harry was in charge of the house at the start and during construction."

Finally on the issue of partnership the court's attention is directed to the following admissions of the plaintiff (R. 140):

"Q. You stand then on your proposition, that at no time were you a partner of Al Fagerberg?

A. I certainly do.

Q. That you worked for him six years, for him and some more or less visionary partner of his in Seattle, whom you never saw and never corresponded with?

A. Yes, sir.

Q. You never got any money out of either of them, but your board; he owed you $3,800 which you gave back and you never had any business interest in the possible profits of this vast ramification of business that Al was trying to transact?

A. Not a bit; at that time I was aware of the Carstens Packing Company in 1910—and my brother will admit then I did not want to have nothing at all to do with the Carstens Packing Company only on a wage proposition and I wouldn't go into business with them at all under any consideration; if I knew they were in a concern I would get out, believe me, before they got a chance to hook me.

Q. That was your attitude toward them in 1910?

A. That was my attitude toward them in 1910.

Q. But you worked for them three years afterwards without wages?

A. Yes, I did, out of consideration for my brother—that was the facts of it."

And particularly the following (R. 153-4):

"Q. At the time this attachment was made and for a year or two beforehand, is it not true that around McCarthy and Blackburn, in that country, you were universally know as Fagerberg Brothers?

A. To a certain extent, yes.

Q. And is it not a fact that your neighbors up there dealt with you as Fagerberg Brothers?

A. To a certain extent, yes; a good many of them, however, were aware of the fact how it stood, some of them.

Q. Wasn't it generally understood that Fagerberg Brothers owned the freighting business and roadhouse and were running it together?

A. Yes, that is the way it was understood."

Comment on this last admission seems superfluous when it is remembered how many acts of the Fagerbergs already cited from the testimony built up the popular belief that they were partners.

In view of the remarkable statements made by the Fagerbergs to explain away the presumption of partnership raised by their course of conduct in business this seems like a fitting place to bring up the question of veracity. Counsel for defendants insist that the claim of the Fagerbergs that they were never partners and that H. M. Fagerberg was working for J. A. and Carstens for wages for six years without drawing any more of his pay than he required for the modest personal expense entailed by living on the frontier is a tale so marvelous that unless it were upheld by corroborative evidence sufficient to outweigh its improbability the veracity of the witnesses relating it falls under grave suspicion. No such corroboration appears in the record. All the direct testimony except their own and virtually all the circumstantial evidence contradicts the queer contention of the Fagerbergs. As affecting the veracity of the witnesses the following contradictions and incongruities in the testimony are cited:

When J. A. Fagerberg returned to Alaska about

March 1, 1914, he made an agreement with plaintiff for an incorporation which was to take over all property owned by plaintiff (R. 40). The stockholders were to be the two Fagerbergs and Thomas Carstens. Carstens was to put in $10,000 worth of merchandise and receive $20,000 of the capital stock; J. A. Fagerberg was to get $10,000 of the stock, for what consideration does not clearly appear. H. M. Fagerberg was to get $7,000 for all the property he carried in his name. The total capitalization was to be $50,000. H. M. Fagerberg fixes the value of his property at that time at $10,000 above indebtedness (R. 117). So the corporation was compounded of the following ingredients:—Plaintiff and Thomas Carstens were to put in $20,000 in merchandise and other property, and the remaining $30,000 of capitalization was to be water or hot air, issued for talent in organization or some equally volatile substance. Plaintiff was to receive 14 per cent of the total stock which was to represent $20,000 in actual value. The actual value of his stock then would have been $2,800 until augmented by phenomenal profits, which seem never to have been made out of the Fagerberg enterprises at any time between 1907 and 1914, and were finally achieved only through a jury verdict in 1915.

Just why plaintiff was willing to exchange visible property worth $10,000 for corporate stock worth $2,800 on the basis of its real assets seems difficult to explain from the standpoint of sound finance, but plaintiff rose to the occasion by calling attention to the provision in the agreement that J. A. Fagerberg

was obligated to purchase plaintiff's $7,000 worth of stock at par before September 1, 1914 (R. 41-2). He said he was willing to take that much and get out of the country (R. 117). The latter statement followed his assertion that he was really to receive $825 a month rental for the various properties he was to transfer to the incorporation in case the corporation scheme failed to crystallize. This contribution to history by the guileless plaintiff in the case seems worthy to be embalmed in the argument, since it exhibits the mental processes of the young man who worked for his brother seven years for his board, and then, knowing his brother to be insolvent with judgments hanging over him, was willing to turn over to that speculative person $10,000 worth of property in consideration of a memorandum agreement that the said brother was to pay him $7,000 cash in less than six months. Here is plaintiff's testimony found on pages 115-6-7-8 of the record:

> "Q. What property was to go into this incorporation besides the $9,000 worth of personal property you put in and the few thousand dollars Carstens was to put in?
>
> A. There was the Nizina roadhouse and store and practically everything I had in the country—that is practically what it amounted to when it came to a showdown. I intended to clean up with this agreement in the fall—I was to get my $7,000 clean out of the business and I was to have nothing left in the country; that included some claims I had in the Shushanna, my interest in the mill, the Borger-Struck Mill Company, etc.
>
> Q. What was that worth?
>
> A. That was practically borrowed money I

had and that was to be cleared up.

Q. What was the value of your mining property and the mill property, approximately?

A. The mill had about 150,000 feet of logs on hand. They cost about, in the water, $11 per thousand landed in the water.

Q. That would be then something over sixteen or seventeen hundred dollars?

A. Yes, and the value of the mill at that time, over $2,000.

Q. Somewhere from $3,500 to $4,000 in the mill and logs and lumber in the mill?

A. Yes, sir.

Q. And your Shushanna claims were wholly of speculative value?

A. Yes, my Shushanna claims were of speculative value.

Q. You considered they had some value—they were fair prospects?

A. Yes, sir.

Q. Then you had something like $13,000 worth of property?

A. Practically—you might put it that way, yes.

Q. And Carstens was to be allowed $10,000 for his old loan in the Nizina store?

A. Yes, sir.

Q. And $10,000 for new property he was to put in—was he to put in the full $10,000?

A. That was my understanding of it—that he was to put up $10,000 cash.

Q. What was Al to put in for his $10,000?

A. I don't know—I left that to him, that was his own business and I didn't consider it, as long as the prospect suited me.

Q. The company was to be organized for $37,000, and you were to put in $13,000 of property and get $7,000 out of it?

A. Yes, sir.

Q. Mr. Carstens was to put in ten and get twenty?

A. Yes.

Q. And Al was to put in his talent and get ten?

A. Yes, sir. When I put in this $13,000 you want to know that there was some liabilities against this thing.

Q. How much were they?

A. Close on to $3,000.

Q. Then the equity wasn't over $10,000?

A. No, sir.

Q. And you were anxious to get out of the country and were willing to take $7,000?

A. Yes, sir.

Q. You had property then, personally, there worth $13,000 with mortgages or other liabilities against it aggregating $3,000. It was worth about ten?

A. Yes, sir.

Q. And you at that time made a lease to your brother which aggregated a return to you of $925 per month?

A. Yes, sir.

Q. Which would be $11,100 per year?

A. Yes, sir.

Q. And you insist that no one but yourself had any interest in that?

A. I certainly do.

Q. And you leased that to your brother, property worth $13,000, at a rate that was to bring you $11,000 a year?

A. Yes, you can put it that way.

Q. But you were willing to take $7,000 for it and get out of the country?

A. Yes, sir.

Q. There was no understanding at all, no secret agreement, between your brother and yourself that he really had an interest in that property but that it had to be carried in your name on account of his difficulties with his wife?

A. There certainly was not.

Q. There never was at any time?

A. No, sir."

The statement on page 117 that the lease called

for rentals aggregating $925 a month is an error to the extent of $100. That sum included plaintiff's wages of $100 a month. The lease called for $825 a month, or $9,900 a year.

So this phenomenon was offered to the jury and is now presented to this court. Plaintiff owned property worth $13,000, mortgaged for $3,000, leaving a net value of $10,000. He agreed to place it among the assets of a corporation for capital stock worth in property assets $2,800, and in face value $7,000, and he did this on the assurance of his insolvent brother that the latter would pay him $7,000 in cash within a little more than five months. He had worked for that brother, according to his own sworn statement, seven years for his subsistence and a string of unfulfilled promises, yet with child-like credulity he started again for the end of a rainbow in search of a pot of gold. Meanwhile part of this $10,000 worth of property was leased to the insolvent brother at the rate of $9,900 a year. And yet Harry Fagerberg wanted to sell his immensely productive holdings for $7,000 and get out of the country. It will be noted that the lease included only the roadhouses and stores at Blackburn and Chititu and the horses. The sawmill and logs and lumber were not included. Plaintiff estimated that concern to be worth $9,000 (R. 114). He leased it, therefore, for more than 100 per cent of its value annually.

This may have impressed the jury as a good story and worthy of implicit belief. Apparently it did, for they seem to have fixed damages to correspond with

this amazing earning capacity. To less credulous persons it suggests a get-rich-quick prospectus issued by a shoe-string promoter. Plaintiff was willing to sell for $7,000 property that he valued at $10,000 above incumbrances, and part of which was capable of earning $825 a month. The mill property was also to go in (115). Out of that and a logging contract plaintiff says he could have made $5,000 in a few months (R. 62-3). Yet with all this easy money coming his way he made a contract to sell everything he had for much less than its annual earning power.

Is not that a declaration that affronts common intelligence? Is it not infinitely more probable that he and his brother owned everything in common and that plaintiff was willing to take $7,000 for his half interest? The probability fits perfectly with the great array of evidence pointing to a partnership. The following fragment of testimony by plaintiff is commended to the court:

> "Q. Why did you make this lease to Al? (Referring to paper).
>
> A. To protect myself.
>
> Q. To protect yourself in what way—why didn't you run the roadhouse if it was so profitable?
>
> A. If any man comes along and makes me a proposition of $7,000, and I was to get it, I was willing to quit the country.
>
> Q. What I am getting at is—you owned this roadhouse and everything in it, and it was a very profitable business, and you owned the horses, and you figured out you could make good money—a good many hundred dollars per month from them and yet you leased everything to Al Fagerberg and turned in and worked for him for

$100 per month according to this agreement?
A. Yes, sir'' (R. 93-4).

Plaintiff's reiterated assertions that the Carstens Company were a bad lot and that he never trusted them read queerly when contrasted with his statement that he considered that he was working for Thomas Carstens continuously from 1907 to 1913. Several of the reflections on Carstens have already been quoted, but the following is notably pertinent:

''Q. Now, you say that in 1910 the reputation of the Carstens people was very bad up in that country and as far as you knew you would not trust them for anything—from what did you get that impression?
A. The surrounding country.
Q. Do you mean by something somebody had told you?
A. To a certain extent and their dealings in other ways; I was afraid of them.
Q. But you kept on working for them for several years afterwards?
A. To a certain extent; you can put it that way—it wasn't out of consideration for the Carstens Packing Company.
Q. What particular things did the Carstens Packing Company do to you that caused you to have such a bad opinion of them?
A. Nothing particular.
Q. They had left a $30,000 stock of goods up there in the custody of yourself and brother for three years and had not received a cent for them—is that what caused you to be so hostile to them?
A. No, not necessarily; it was their way of doing business I didn't like.
Q. You say you did the business with them wholly through your brother and never attempted to get into any communication with

them directly?

A. No, but he got his instructions from the Carstens, believe me—he went out every fall.

Q. Do you know what those instructions were?

A. To a certain extent I do.

Q. From what?

A. Just by his conversation and by some letters that came up there later from Mr. Carstens.

Q. You have seen letters from Mr Carstens?

A. I have, to him.

Q. Have you them in your possession?

A. No, I have not.

Q. Do you know whether Al has them?

A. He has some of them; they will come up later on." (R. 152-3.)

Plaintiff did not like Carstens' way of doing business after he and his brother had frittered away a valuable stock of goods without making any return. When he got the bill of sale in 1913, according to his own admission, the stock remaining was practically worthless (R. 112). Following plaintiff's testimony just given here is another statement by him that is interesting reading:

"Q. Now, you had considerable difficulty with Al; he collected the money for six years and you never did anything as you have stated until 1913. How did you come to do business with him in 1914? You have stated at various times during the course of this examination that you worked for Al during all the years from 1907 to 1913 and never got your wages out of him. Now, with that fact in view, how did you come to trust him so far as to do any business with him at all in the spring of 1914? What did you have to go on? What was your reason for giving him a lease of

all this property and taking the chances of not getting anything out of him?

A. When he came back in the spring of 1914 with this proposition of incorporation, I said—'how do I know you are representing the Carstens? You claim you are?' 'Well,' he says. 'Harry, all I can say is this; I have nothing to show you, but I have a carload of oats down here that I have to pay $1,500 on; if I draw a sight draft on them and that is accepted by them and goes through, will you believe that they are back of me then,; and I says, 'Yes,' and he drew this draft and sent it out and it went through and he got the carload of oats released and I naturally supposed it was a cinch." (R. 144-5.)

When J. A. Fagerberg secured money from Carstens it seemed to revive plaintiff's confidence in somebody and induce him to endure the handicap of association with Carstens a little longer. He did not state whether payment of J. A. Fagerberg's sight draft for $1,500 was a part of the Carstens way of doing business that he did not like.

C. I. Range testified that plaintiff in April, 1912, asserted that he had a half interest in all the Fagerberg property. Range said, giving in substance the conversation:

"A. It came up with regard to their business over there; they had some trouble about their business; he was talking to me about it, Harry Fagerberg was, and I asked him how he was situated over there, and he said he owned a half interest in the whole thing, and that they were trying to beat him out of it, and I said to him that I would take a club and drive them out if I was in his place.

Q. Drive who out?

A. Al and a lady who was there.

Q. Some woman—do you know her name?

A. Mrs. Damon.

Q. Now, when Harry Fagerberg stated they were trying to beat him out of his interest, to whom did he refer?

A. Al and the woman.

Q. And I understand you to state that he said he owned a one-half interest in everything?

A. Yes, everything they had, the Chititu store and the roadhouse, and store over there at Blackburn, and the mine on Dan Creek." (R. 357).

H. M. Fagerberg gave this version of the same conversation.

"A. I didn't tell him that I owned a half interest in the business—I told him in these words, that I had practically put up half the money to build up the business and I had done the work and didn't intend to be skinned out of it, but I didn't refer to Mrs. Damon when I made the statement that they were trying to beat me out of it.

Q. Whom were you referring to?

A. I was referring to Al and Carstens.

Q. You recollect having this conversation?

A. I do, yes, sir.

Q. Where did it take place?

A. At Dan Creek.

Q. What money did you refer to when you mentioned about this money you spoke of?

A. Money I had let them have from my salary." (R. 379).

Argument can hardly make plainer to an enlightened intelligence that plaintiff engaged in special pleading rather than testifying when he put forth the various statements quoted. To make a suggestion cautiously, it would seem that plaintiff handled facts so carelessly as to do them great damage at times. Turning to the testimony of the voluble J. A. Fager-

berg it is soon observed that he was contradicted by several witnesses including himself. A notable contradiction between him and Carstens and W. C. Prater appears in their accounts of negotiations in the summer of 1913, just before J. A. Fagerberg gave his brother the bill of sale for all the Alaska property in the Fagerberg name. Mr. Prater, treasurer of the Carstens Packing Company, testified that Fagerberg "came to our office and said he wanted to give a bill of sale on all of his property in Alaska to me, and wanted to do it quick" (R. 287-8). Prater's testimony continues:

> "Q. To whom?
>
> A. To me personally. He wanted I should hold the title until he got settled with his wife; he was afraid his wife would attach it or start some proceedings and tie it up. I told him that he did not owe me anything and I could not legally hold it, and I would not accept it, as it would only get us into litigation, and would not be binding anyway, and I suggested that he owed Mr. Carstens, and to give the bill of sale to Thomas Carstens. He hesitated a while and then decided to give the bill of sale to Thomas Carstens. Mr. Wilt is our attorney and generally looks after such matters for us; he is employed exclusively for the company, and he was at that time in the East, and would be back on the 17th, and I asked Fagerberg to delay the matter for a couple of days until Mr. Wilt returned and could fix it up for us without going to another attorney. He said he would, so he went away and Mr. Wilt returned in a few days, and I called him up and called his attention to the matter, and he said we would have to get in touch with Fagerberg and get that bill of sale right away, so I made an effort to locate him and found he had left the city.

Q. Fagerberg had left the city?

A. Yes. He was dodging his wife, expecting her to have him arrested at any time for defaulting in his payment of alimony and put him in jail, and he had hid at La Conner, and Mr. Wilt made a trip up there and spent a day there, but failed to catch him; he dodged him; he got wind of some one looking for him and he skipped and Wilt came back to Seattle and took the matter up with Mr. Custer, his brother-in-law."

Prater then testifies that Custer later located Fagerberg and arranged a meeting of the three at a hotel in Everett. When they met Fagerberg he stated that he had already given a bill of sale to his brother, Harry Fagerberg (R. 290). Prater then asked him to go to Tacoma and see Mr. Carstens, but Fagerberg at first objected, saying he was afraid he would be arrested. He was persuaded to go along with Prater and Custer. At Tacoma he agreed with Carstens to go to Alaska at Carstens' expense to get title to the Alaska property and straighten out the business. Prater was instructed to get a steamer ticket for Fagerberg, which he did, but the evening Fagerberg was to sail he called Prater up on the telephone and said "he was afraid to go to Alaska unless we would agree to pay his back alimony in case they arrested him up there and he would have to pay or go to jail." Prater told him he would have to see Carstens about that and there the matter seems to have dropped (R. 290-1).

In answer to the question whether Fagerberg in the Tacoma negotiations gave any reason for having executed the bill of sale to his brother Mr. Prater answered:

"He stated that the bill of sale was made to his brother for the sole purpose of keeping his wife from getting hold of the property" (R. 292).

Thomas Carstens corroborated part of the testimony of Mr. Prater just cited (R. 320-1), and in answer to the question whether Fagerberg gave any reason for transferring the Alaska property to his brother, said (R. 321):

"The reason he gave for assigning the property to his brother was on account of trouble he was having with his wife; at that time he had a divorce suit pending, and he feared his wife would attach his property and he wanted to turn it over to us, and as Mr. Prater refused to take it, he turned it over to his brother."

J. A. Fagerberg's account of his conversation with Prater is as follows:

"Q. When did you first see Mr. Carstens or Mr. Prater in the summer of 1913?

A. It was right after the fourth of July; I had been home a day and I went down to Mr. Prater and said, 'How about that old mess out there,' and I said, 'I am going to turn it over to Harry, if you don't take it,' and he said, 'I won't have anything to do with it, go ahead,' and I says, 'All right,' I says, 'The deal is off now all right; your old Nizina stock is gone and what money I have put in we have lost'; he said, 'all right, I won't have anything to do with it,' and I went to Mr. Custer and said, 'George, make out a bill of sale for that stuff up there,' and I gave him the items and that evening I left." (R. 200).

Defendants' counsel submit without argument the issue which of these conflicting accounts is true;—that of Carstens and Prater, who had dealt liberally and fairly with Fagerberg and trusted him for years,

or that of Fagerberg, who seems to have kept no promises, even to his brother. On pages 200-1-2-3-4-5-6-7 of the record Fagerberg gives a rambling account of negotiations with the Carstens people which bears throughout the impress of reckless statement. He had already twice asserted (R. 173-202) that Carstens became greatly excited over the Shushanna strike shortly after the bill of sale was given to H. M. Fagerberg July 15, 1913. As evidence of that he introduced a letter from Carstens which appears on pages 174-5 of the record. This letter refers to the possibility of getting the Alaska property turned back to Harry Fagerberg and discusses an investigation and report by J. A. Fagerberg on the business outlook in the district. It refers particularly to the horses and concludes:

> "In case they are not doing well and the chances of earning money are not favorable would advise you to dispose of the horses to best advantage and when you come back then will be the best time to talk things over carefully and decide how to proceed right."

It is respectfully submitted that this letter does not betray great excitement or mental strain, and is not the letter of a man who was offering unlimited backing to a party who had used up a valuable stock of goods without making any return. And here is a good place to show where Fagerberg contradicted himself, although his counsel insisted that there was no contradiction and the trial judge expressed a doubt. Let this court decide. Defendants' counsel read to Fagerberg from the transcript of his testi-

mony in his bankruptcy proceedings and the record shows the following (R. 207-211):

> "'Question: What was the arrangement you had with Carstens or the Carstens Packing Company about these goods that were shipped up last spring?
>
> Answer: After I went to Prater and gave him this talk, told him to protect himself and Harry and do what was right, shortly after, why the Shushanna stampede started in and they got excited, anything I wanted then they would advance, they would pay my back alimony—I didn't have a dollar, I went broke on the Kruhm deal. They first started in to hunt me and some of the boys thought that somebody was after me and they said, 'Get out of sight,' and I went back home, and then Custer got hold of me by telephone, and he said, 'They want you to come up here,' and then they wanted me to go back on account of the Shushanna stampede; that was along in August, 1913, and I went so far—Wilt got me over there in Tacoma and says, 'You are the only fellow that can go back there and get it back and we will do something with it.' I says, 'I will think about it,' and he says, 'Well, if you ain't got the money we will advance you money to pay your back alimony and everything else, go ahead and take hold of it again and we will stay with you,' and I said, 'All right,' and Prater agreed to it and when I came home my own folks said, 'Nothing doing, you stay here until you get this other settled up,' and my sister gave me $45 so I could go to Cordova and the rest of the way I was to beat my way—that was in August, 1913.' Is that a correct statement of your testimony last fall?
>
> A. That is incorrect there—that $45 I got from the Carstens Packing Company.
>
> Q. This is a conversation between you and your home folks, you say, after talking about

your conversation with the Carstens, my own folks said, 'nothing doing,' etc.?

A. My sister didn't give me the $45—that is a mistake.

Q. You think that is a mistake of the stenographer's notes?

A. That is a mistake in the stenographer's notes—I was talking too fast for him.

Q. Is this also a mistake—near the bottom of Page 20; you remember the question and answer I read you a while ago wherein I asked you about your conversation with Mr. Wilt to the effect that you wanted to get this out of your name so your wife couldn't get it, and you answered 'I never talked to Mr. Wilt about it.' Now, on the same page you say, 'Wilt got me over there in Tacoma, and says, 'You are the only fellow that can go back there and get it back and we will do something with it.' I says, 'I will think about it,' and he says, 'Well, if you ain't got the money we will advance you money to pay your back alimony and everything else'! Now, which of those statements is correct, the statement made near the top of Page 20—that you never talked to Wilt about this, or the statement at the bottom of the page that he offered to pay your back alimony, etc.?

MR. DONOHOE. We object to that—there is no contradiction in that.

THE COURT. I am not sure that there is a contradiction at present. If you find it and point it out to him, you may ask him.

Q. Read that question and answer—read to the bottom of the page (Handing witness paper). What I want to get at is, did you or did you not talk to C. F. Wilt about your trouble with your wife?

A. No, I didn't talk to Mr. Wilt about the trouble with my wife. He went with me to the office; Prater, Custer and Carstens had had a conference there in Tacoma and Mr. Wilt came in to it, and we walked out over the bridge there

and I was going to take the boat and he was going up-town and I couldn't state just what the statements were, but as far as Mr. Wilt being in on the conversation or statements, I don't remember anything about it.

Q. You say you never talked to him and he never talked to you?

A. He never talked to me directly on anything of that kind. Mr. Carstens was the man—Mr. Prater was the man I went direct to.

Q. The question of back alimony never came up when Mr. Wilt was present?

A. Not when Wilt was present—it was between I and Mr. Carstens.

Q. In other parts of your testimony that you gave in that examination you stated and I believe you stated this morning, if I understand you correctly in answer to Mr. Donohoe's question, that as soon as the Shushanna stampede started, Mr. Carstens was anxious for you to go up there and got after you—Now did they or did they not as one of the inducements offer to pay your back alimony to avoid trouble with your wife?

A. They offered to pay it, yes, sir.

Q. What was the final result of that?

A. Mr. Carstens asked me the amount and one thing and another—I can't recall exactly what was said.

Q. That dicker fell through entirely then?

A. Well, when I wouldn't go back, I called him up over long distance; I was up at my brother-in-law's and he said, 'All right,' and he says, 'We will just let it drag along.'

Q. It was dropped then?

A. It was dropped then indefinitely."

The court will note that Mr. Fagerberg believes he talked too fast in one stanza for the stenographer. Careful scrutiny of all his testimony indicates that he conversed on the witness stand at all times with too

much speed for careful thinking. It was this which led him into the contradiction, which is so plain that he who runs may read.

On pages 208-9 Mr. Fagerberg avers rapidly. "Wilt got me over there in Tacoma and says, 'Well, if you ain't got the money we will advance you money to pay your back alimony and everything else.' "

On page 210 Mr. Fagerberg says, "I didn't talk to Mr. Wilt about the trouble with my wife." Farther down on the same page he says the question of back alimony never came up when Wilt was present.

That will be about all for Mr. Al Fagerberg. The court will note that Carstens and Prater testified by depositions taken several months before the trial. They had no opportunity to deny specifically numerous loose statements in Fagerberg's fluent remarks, but by anticipation denied enough to raise squarely the issue of veracity.

The second assignment of error (R. 441) alleges error on the part of the court in admitting the testimony of the plaintiff, over the objection of defendants, as to speculative profits he might have made in conducting the Blackburn roadhouse and using the attached horses if the attachment had not been made. It also alleges error in admitting testimony of profits at all in view of plaintiff's evidence that he was working for wages. The testimony to which defendants objected appears in the record on pages 51 to 63 inclusive. Several objections were sustained by the court but plaintiff was allowed to make loose estimates based wholly on his own alleged opinions of the

business he could have done at the roadhouse and with the horses. Counsel for defendants insisted at the trial (R. 55-6) and reassert here, that as plaintiff was working for $100 a month when the action complained of was brought and when the first levies of attachment were made he was estopped to show what he could have made by use of the property, since he would not have used the property himself if the attachment had not been made. He sought to evade this by showing that the property was turned back to him by J. A. Fagerberg between the first and last levies, which were several days apart, but that was merely begging the question since the attempted change in possession of the property involved was due to the attachment. That is undisputed.

On the question of profits plaintiff testified as to conditions at the roadhouse during the month preceding the attachment. Although he had testified that he was working for wages as a packer and mail carrier it is interesting to note how easily he and his counsel slipped into speaking of the roadhouse as if plaintiff had been running it for some time previous to the attachment (R. 52-3). Plaintiff stated (R.54) that his profit on a guest was about $2 a day. Following the statement was this testimony:

> "Q. You say during the month of July or about the time this attachment was made, to be more exact, you think the average of your guests on or about that time was about seven or eight?
> A. Yes, sir.
> Q. And you made $2.00 on each guest?
> A. Yes, sir.
> Q. And that the conditions in there last fall

were such that you would have continued to have had about the same number of guests each day and make the same profit off of each one?

A. It would have been more; the business would have been better.

Q. You wouldn't make as much money as that along in the winter, would you?

A. No, sir.

Q. How are business conditions up there in the month of November, we will say?

A. Along in November——

MR. RITCHIE. We object to this kind of questioning—it is nothing on which to base an action for damages. You have to show it by actual figures. This is too speculative.

Objection overruled. Defendants allowed an exception."

During the month of July, plaintiff had already testified, he was packing and carrying mail with the horses he purported to have leased to his brother.

Plaintiff then proceeded to give his opinion as to how much he could have made during several months following if the roadhouse had not been attached. defendants repeatedly objecting (R. 54-5). On page 56 occurs the following:

"Q. Now, had you remained in the possession of that roadhouse, and knowing the conditions of business generally at McCarthy and the possibilities of this roadhouse business, what would you say would have been the average number of your guests during the month of November, 1914?

JUDGE LYONS. We renew our objection.

Objection overruled and exception allowed defendants.

A. Well, perhaps, three, straight through.

Q. November?
A. Yes, sir.
Q. What about December?
A. Practically run about the same.
Q. It would run the same all winter?
A. Until about the first of February.
Q. Then it would improve?
A. Yes, then it would improve again.
Q. How are conditions up there in the spring at McCarthy, in a business way, quiet?
A. Quiet to a certain extent; yes, sir.
Q. Do you think that the average number of guests you have named would have continued up to the present time?

MR. RITCHIE. We object to that as leading and suggestive.

Objection sustained.

Q. How many guests do you think there would have been between the first of February and this date at the Blackburn roadhouse?
A. That is a rather hard question to answer but on an average, take it as a whole, why I should say about 120 guests per month, straight through on an average.
Q. Four a day?
A. Yes, sir."

On cross-examination plaintiff reduced his estimated profit to $1.50 a day on each guest (R. 130). He also admitted that there would be little profit on a small number of guests (R. 131).

Plaintiff then testified to the amount of money he could have made at packing with horses at stated rates per pound; asserting that he could have kept the horses steadily employed (R. 57-8-9). This testimony reads like a calculation on the profits of hen culture, it being assumed that the industrious hens

will lay a stated number of eggs each month and that some miraculous power will maintain an excellent price for eggs. Next he testified (R. 59-60-1-2-3) that he could have made a large amount of money out of a timber contract and cordwood. This assumption was based on the fact that "the Kennecott Mines Company advertised for bids on a certain amount of timber" (R. 60), and he could have made 3 cents a foot on it if he had been given the contract. He seems to have expected the jury to assume that he would have had the contract but for the attachment of the horses.

It is hardly necessary to cite law to this court to show that a man cannot claim damages for loss of profits on a contract he believes he might have obtained if he had asked for it. He offered no evidence that he was assured of the contract under any circumstances. After plaintiff told what he might have done the record reads as follows (p. 62-3):

> "Q. As a result of these things that you have just testified to, what would you say was the total damage by reason of being deprived of those horses from the 20th day of October until the present time?
>
> JUDGE LYONS. We object to that; he must show each particular place he was damaged.
>
> MR. DIMOND. I ask him to base his opinion on the items he has mentioned and this logging contract particularly.
>
> Objection overruled; defendants allowed an exception.

A. On the mining and logging I could practically have made $5,000.

Q. How long would that logging have lasted?

A. It could have lasted all spring, up until the packing set in.

Q. How much was there of it, did you say?

A. There was one hundred thousand feet of mining timbers.

Q. You mentioned something about cord wood—what was that?

A. That was for the mine.

Q. How much?

A. Two hundred cords.

Q. How much would that cost you to get it out?

A. I wouldn't have made so much on that, but would have made practically about one dollar a cord clear—that is all I could have made on that,—that is allowing $2.50 per day for the horses.

Q. Now, you figure it—100,000 feet of timber you say you could have made three cents per foot on; that is $3,000 and $200 on wood, and you state you could have made altogether $5.000—where is the rest of it?

A. On account of the logging proposition—I was getting under my agreement with Borger and Struck $2.50 per day for every day I put in getting out logs.

Q. Where were these logs used?

A. At the Borger-Struck mill."

From plaintiff's testimony the following interesting situation is made to appear. He had worked for wages for his brother and Thomas Carstens continuously from August, 1907, until August, 1914 except the few months between July, 1913, and March,

1914, when he claims to have been in business for himself. After those seven years of service he held in his own name property that he was willing to sell for $7,000 at a time when business conditions were such that he feels sure he could have made at least $5,000 clear of expense in a few months following if the attachment had not been levied. And still he admits that if the Carstens attachment had not intervened he would have continued to work for $100 a month and board and let somebody else clear up the $5,000 on the roadhouse and horses, which $5,000 he persuaded the jury was practically a sure thing, as that remarkable squad of citizens gave him a verdict for $4,750 damages for loss of profits in nine months next ensuing. (See verdict, R. 412.) Here is plaintiff's own admission on cross-examination (R. 132-3):

> "Q. If there had never been any attachment, you would have gone on working for $100 per month?
>
> A. Yes, sir.
>
> Q. And that would have been the extent of your profit?
>
> A. Yes, sir."

As showing the bias of the jury it is worthy of mention that in their verdict they practically accepted all of plaintiff's valuations of property, as well as measurement of damages. They fixed the value of five horses at $1,000 (R. 411), which was plaintiff's appraisement of $200 each (R. 49-50). Yet he had admitted that he bought two of them the year before for $285 and one for $75 (R. 97-8).

This brief has not heretofore discussed the law

of the case because it seemed more logical to place first before the court enough of the essential testimony to give the court complete grasp of the principles of law involved. Having just quoted testimony on the question of profits we will proceed with our view of the law on that.

It is elementary that in an action like the one at bar only such damages may be recovered as can be actually proven; that all remote and speculative damages must be excluded. The rule is thus laid down in *Howard vs. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199-206, a case often cited since in supreme court and other reports:

> "The grounds upon which the general rule of excluding profits, in estimating damages, rest are (1) that in the greater number of cases such expected profits are too dependent upon numerous, uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages."

The other reasons stated by the court refer to breaches of contract. This statement of the law is approved in *Fidelity Company vs. Bucki Company*, 189 U. S. 135-142, a case in which damages were sought on account of an attachment. In affirming the judgment the supreme court approved the following from the instructions of the trial court to the jury, found on page 140 of the opinion:

> "Every author of authority referred to, even by the plaintiff's attorney, says there must be some certainty.
>
> "Now the certainty of profits here depends upon this: It is claimed that on account of these

attachments the plaintiff's credit was injured; that had it not been for the attachments, money could have been borrowed, timber land or stumpage could have been procured, logs could have been procured profitably; if logs could have been procured profitably, lumber could have been manufactured and marketed profitably. Now, between the borrowing of the money and the marketing of the lumber there are so many uncertainties that the court cannot say that there is sufficient to justify the jury in finding perhaps large damages against the defendant in this case on account of loss of credit and profit—from the levying of the attachments."

The statement of the law already given from the *Howard vs. Stillwell* case, is also cited with numerous other authorities in *Cincinnati Gas Co. vs. Western Siemens Co.,* 152 U. S. 200, on page 206.

In *Williams vs. Island City M. & M. Co.,* 37 Pac. 49 (Ore.) this subject is discussed at some length with numerous citations of cases. On page 51 the opinion says:

"In many cases, profits are the only certain or reliable measure of damages; but as a general rule the expected or anticipated profits of a business enterprise cannot be proven with any degree of certainty, and therefore cannot be recovered. They can only be computed or ascertained by guess or speculation, because they depend on so many contingencies, such as competition in business, supply and demand, the condition of the money market, availability of labor, and like uncertain conditions. There may be future profits in any business, or there may be losses. 'Hence, in such cases, the measure of damages is,' says Mr. Sedgwick, 'not expected profits, but the average value of the use of the business; and, to ascertain this, evidence of actual past profits must be admissible.... 1. Sedg. Dam. Sec. 174."

Possibly as fair an exposition of the rule as can be found is in the following from Sutherland on Damages:

> "The objection that the damages are uncertain and speculative is insuperable when they are incapable of estimation and proof with that degree of certainty requisite to establish facts for the consideration of a jury. There should be no distinction as to the degree of certainty required in proof between this fact and any other upon which either the right to damages or their amount depends. A conservatism, however, pervades generally the law of damages; and it being the common experience that there is a wide difference between the theoretical or speculative profits estimated in advance, without any actual data, and the result usually achieved when the scheme is put in practice, it is necessary that the law should discard what is merely fanciful or possible and only permit those profits to be considered which have some basis of actual facts to support them." Sec. 867.
>
> "When it is advisedly said that profits are uncertain and speculative and cannot be recovered when there is an alleged loss of them, it is not meant that profits are not recoverable merely because they are such, nor because they are necessarily speculative, contingent and too uncertain to be proved; but they are rejected when they are so; and it is probable that the inquiry for them has been generally proposed when it must end in fruitless uncertainty; and therefore, it is more a general truth than a general principle that a loss of profits is not ground on which damages can be given." Sec. 868.

The following cases also lay down the law to the same effect:

> "The measure of damages for the wrongful suing out of an attachment is such sum as will

compensate the injured party for the injury fairly and impartially, and the jury in an action therefor cannot speculate by taking into consideration any hopes of future profits or successful enterprises. *Kennedy vs. Meacham*, 18 Fed. 312; *Holliday Bros. vs. Cohen*, 34 Ark. 707; *Pollock vs. Gantt*, 69 Ala. 374, 44 Am. Rep. 519.

Mere possible or speculative expectations of profits and collateral advantages are not to be taken into account. *Myers vs. Farrell*, 47 Miss. 281.

An attachment of a stock of goods which was wrongful but not malicious does not authorize a recovery against the attaching creditor of the profits which the debtor might have made in his business, had it not been interrupted by the attachment, as the amount would have been too conjectural. *Braunsdorf vs. Fellner*, 76 Wis. 1, 45 N. W. 97.

An attachment of a stock of goods which was wrongful but not malicious does not authorize a recovery against the attaching creditor of the profits which the debtor might have been made in his business, had it not been interrupted by the attachments, as the amount would have been too conjectural. *Braunsdorf vs. Fellner*, 76 Wis. 1, 45 N. W. 97.

And claims for loss of profits in the retail of goods wrongfully attached, and loss of business and custom, and loss of credit, are properly stricken out in an action for a wrongful attachment, as not being such elements of damages as are proper subjects of allegation or proof. *Lowenstein vs. Monroe*, 5 Iowa, 82, 7 N. W. 406.

And damages sustained from a wrongful attachment by reason of the fact that the person attached was making advances to timbermen and others, and thereby had become interested in the handling of timber and crops, and that, owing to his mercantile business being stopped by the attachment, he lost these advantages, and

lost his advances and the shipment of his timber, are too speculative and remote for recovery in an action for the wrongful attachment and proof to that effect is inadmissible. *Pollock vs. Gantt*, 69 Ala. 373, 44 Amer. Rep. 519.

Whether a steamboat could or could not have earned anything during the time she was in the custody of the sheriff under attachment, is a matter of speculation which is not susceptible of proof, and damages for the loss of such earnings cannot be recovered in an action for a wrongful attachment of the boat. *Callaway Min. & Mfg. Co. vs. Clark*, 32 Mo. 305."

A fatal objection to plaintiff's attempted proof of damage through lost profits is that his proof consisted wholly of his unsupported testimony as to the business he believes he could have done but for the attachment. Leaving out of this phase of the argument the fact that he would not have been in business for himself at all but would have been working for a monthly wage of $100, which up to the time of the attachment he had not collected, still he did not meet a settled requirement of the law that proof of anticipated profits must be based on past experience. He offered practically no proof at all of past performances, and thus failed to meet a rule of law that is not doubtful.

"It is a very easy matter to figure out a large profit upon paper; but it will be found that these, in a great majority of the cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance." 1 Suth. Dam. Sec. 64.

"If a regular and established business is wrongfully interrupted the damage thereto can be shown by proving the usual profits for a reas-

onable time anterior to the wrong complained of. But it is otherwise where the business is subject to the contingencies of weather, breakages, delays, etc." Id. Sec. 70.

In support of defendants' contention that the evidence conclusively established the existence of a partnership between the Fagerbergs the following authorities are cited:

"Wherever it appears that there is a community of interest in the capital stock, and also a community of interest in the profit and loss, then it is clear that the case is one of actual partnership between the parties themselves, and of course it is so as to third persons. All of the decided cases, however, agree that it is seldom or never essential that both of these ingredients should concur in the case in order to establish that relation. Cases occur, undoubtedly, where a community of interest in the property, without any regard to the profits, will almost necessarily lead to the conclusion that the relation between the parties was that of partnership; and, under some circumstances, that conclusion will follow, although the sale of the property for the joint interest may not be contemplated by the parties. On the other hand, it is equally clear that there may be such a community of interest in the profits without regard to loss, and without any community of interest whatever in the property as will establish that relation. Participation in the profits, however, will not alone create a partnership between the parties themselves as to the property, contrary to their intention. But merchants and traders are often justly held to be partners as to third persons, where they are not to be deemed such, expressly or impliedly, as between themselves." *Berthold vs. Goldsmith*, 24 How. 536-541-2.

"Where there is a community of interest in

the property and also a community of interest in the profits, there is a partnership." 2 Greenleaf Sec. 482.

"A partnership may exist in a single transaction as well as in a series." *Story, Partn,* Sec. 21. *Pothier, Contrat de Societe,* No. 54; 3 Kent Comm. 30. If there is a joint purchase, with a view to a joint sale and a communion of profit and loss, it is a partnership trade, although it is confined to a single thing.

"If they hold themselves out to the public as partners those who deal with them have a right to so regard them, and they will be bound as partners." Re Warren, 2 Ware, 322, Fed. Cas. No. 17,191.

"One may estop himself from denying his liability as a partner, where such relation does not exist in fact, by holding himself out as such, or by negligently permitting one to do so with whom he is engaged in business." *Rider vs. Hammell,* 66 P. 1026.

"A co-partnership may be established by the dealings of the parties, and other circumstances from which it may be implied." *Reliance Lumber Co. vs. White,* 38 S. W. 391.

"As to third persons, acts and declarations of the parties are sufficient evidence of their partnership." *Robinson v. Green,* 5 Harr. 115 (Del).

"It is sufficient to show that persons have acted as partners, and that, by their habit, course of dealing, conduct and declarations, they have induced those who have dealt with them to suppose that they were partners, to make them liable as such." *Chase vs. Stevens,* 19 N. H. 465.

Counsel for plaintiffs in error respectfully submit that the record shows sufficient errors of law to call for a reversal of the judgment of the trial court and the award of a new trial, and that in addition the verdict and judgment are so clearly against the

weight of evidence as to justify a reversal on that ground also. On both grounds plaintiffs in error are entitled to a *venire de novo.*

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